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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellant, v. DAVID WAYNE DROEGEMEIER, Appellee.	2 CA-CR 2010-0308 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091594001

Honorable Richard S. Fields, Judge

REVERSED

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E S P I N O S A, Judge.

¶1 In this prosecution for first-degree murder, the superior court dismissed the indictment against David Droegemeier before trial on due process grounds related to pre-

indictment delay and the state's failure to preserve certain evidence. The state appeals, arguing the court misapplied the law governing pre-indictment delay and lost evidence. Because Droegemeier failed to show the state intentionally delayed prosecution to gain a tactical advantage, and because he has failed to establish a due process violation based on the state's failure to preserve evidence, we reverse.

Factual Background and Procedural History

¶2 We view the facts and evidence in the light most favorable to sustaining the trial court's ruling. *See State v. Chavez*, 208 Ariz. 606, ¶ 2, 96 P.3d 1093, 1094 (App. 2004). In 1976, J.G. was brutally assaulted at his home in Tucson. He died in the hospital eleven days later of brain contusions associated with a fractured skull. Investigators collected physical evidence at the scene, including blood samples and latent fingerprints, and interviewed a number of persons of interest. By early 1977, however, police considered the case cold and, apparently by mistake, destroyed most of the physical evidence.

¶3 In late 1978, while intoxicated, Droegemeier went to the sheriff's office in Elko, Nevada and told a deputy he had committed the murder and had done so by hitting the victim in the head with a drywall hammer. Detective Dan Martin of the Tucson Police Department traveled to Elko and interviewed Droegemeier, who then recanted his statements, claiming he had made them because he was depressed and drunk, and "was looking for some help."[1] Droegemeier was brought to Tucson where he apparently

[1]Before his arrest in Elko, Droegemeier also had indicated to an acquaintance in Nevada that he had "killed a man" three years before. He recanted this statement as well.

received psychological evaluations that resulted in differing conclusions about his mental health. At that time, Dr. Santiago determined Droegemeier was "not psychotic and would not meet the requirements for a Title 36[, A.R.S.,] Mental Health Petition, nor [we]re there sufficient grounds to justify a criminal Rule 11[, Ariz. R. Crim. P.,] examination." But in a 2010 defense interview, Dr. Gurland stated he recalled evaluating Droegemeier and that it was his opinion that Droegemeier had been "marginal in his level of functioning" and that "whatever he said [in Elko,] one could not rely on."[2] At a preliminary hearing in 1979, the trial court dismissed the complaint, without prejudice, on the ground the state had "failed to sustain its burden of proof." No further action was taken in the case for a number of years.

¶4 In the mid 1990s, J.G.'s brother began to investigate the murder, hiring Martin as a private investigator and recovering duplicates of many of the police records in the case, which apparently had been misplaced. In 2007, the Pima County Attorney's Office assigned detectives to further investigate the case, and a grand jury indicted Droegemeier in April 2009. More than a year of litigation ensued, including a remand to the grand jury for a redetermination of probable cause, which resulted in a new indictment. Finally, in September 2010, in a comprehensive written ruling, the trial court dismissed the second indictment, commenting on the apparent dearth of the state's evidence and ultimately concluding that, although "there is no case directly on point,"

[2]Neither Dr. Santiago nor Dr. Gurland had any records relating to Droegemeier, and the conclusions of Dr. Estes, reportedly the third psychologist to examine him, are apparently unavailable; when interviewed in 2009, he too had no record of Droegemeier and no recollection of him.

extreme circumstances, including the thirty-year delay in resuming prosecution, required dismissal. We have jurisdiction over the state's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4032(1).

Discussion

¶5 "We review an order granting a motion to dismiss criminal charges for an abuse of discretion." *State v. Medina*, 190 Ariz. 418, 420, 949 P.2d 507, 509 (App. 1997). Dismissal of criminal charges may constitute an abuse of discretion if based on an incorrect legal interpretation. *See id.*; *State v. Sandoval*, 175 Ariz. 343, 347, 857 P.2d 395, 399 (App. 1993). The trial court dismissed the sole charge in this case on due process grounds relating to pre-indictment delay and the state's failure to preserve evidence. Although there is some conceptual overlap between these bases for the dismissal, we discuss them separately because case law has established them as legally discrete.

Pre-Indictment Delay

¶6 The state, citing *State v. Lacy*, 187 Ariz. 340, 346, 929 P.2d 1288, 1294 (1996) and *State v. Williams*, 183 Ariz. 368, 379, 904 P.2d 437, 448 (1995), argues the trial court erroneously dismissed the indictment because there was no evidence the state intentionally delayed prosecution to gain a tactical advantage, which it contends is a necessary showing in Arizona to establish a due process violation resulting from pre-indictment delay. As an initial matter, we note that statutes of limitations provide the primary protection against undue delay in bringing charges against a defendant. *See United States v. Lovasco*, 431 U.S. 783, 789 (1977); *United States v. Marion*, 404 U.S.

307, 322-23 (1971); *State v. Van Arsdale*, 133 Ariz. 579, 581, 653 P.2d 36, 38 (App. 1982). But "the Due Process Clause [also] has a limited role to play in protecting against oppressive delay." *Lovasco*, 431 U.S. at 789. Thus, although Arizona's statute of limitations would allow the state to bring murder charges at any time, *see* A.R.S. § 13-107(A), due process may nonetheless prevent delayed prosecution in some circumstances.

¶7 In *Marion*, the United States Supreme Court acknowledged the Due Process Clause affords some protection against stale prosecution, but declined to articulate a test for determining when that protection applies. 404 U.S. at 324-25 ("To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases."). In *Lovasco*, the Court further explained that prejudice to the defendant is a necessary element of a due process claim, but that any inquiry also "must consider the reasons for the delay." 431 U.S. at 790. The Court ultimately held that delay to allow further investigation of the case does not violate due process, even if the defense is "somewhat prejudiced" by the delay. *Id.* at 795-96. But the *Lovasco* Court declined to establish a particular methodology for determining when a due process violation has occurred, preferring instead to leave the lower courts to "apply[] the settled principles of due process . . . to the particular circumstances of individual cases." *Id.* at 797.

¶8 Interpreting *Marion* and *Lovasco*, Arizona courts have applied a two-part test to determine when defendants have demonstrated a due process violation based on

pre-indictment delay: the defendant must show both intentional delay by the prosecution to obtain a tactical advantage and actual and substantial prejudice resulting from the delay. *See Lacy*, 187 Ariz. at 346, 929 P.2d at 1294; *Williams*, 183 Ariz. at 379, 904 P.2d at 448; *Medina*, 190 Ariz. at 421, 949 P.2d at 510.[3] Relying in part on *United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985), Droegemeier contends the Arizona test is based on a misinterpretation of *Marion* and *Lovasco* and impermissibly constricts his rights under the Federal Due Process Clause. Whatever the conceptual appeal of this argument, however, we do not address it because we are bound by the decisions of our supreme court, including its interpretation of federal constitutional rights. *See State v. Stanley*, 217 Ariz. 253, ¶ 28, 172 P.3d 848, 854 (App. 2007); *see also State v. Vickers*,

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[3]The state's assertion that *Marion* and *Lovasco* establish the "prerequisite" of intentional delay by the government is not supported by those cases. In *Marion*, the Court noted the government had conceded the Due Process Clause would require dismissal where the government had intentionally delayed the case to gain a tactical advantage. 404 U.S. at 324. This acknowledgement of a government concession did not establish tactical delay as a definitive requirement for establishing a due process violation. *See id.*; *see also Van Arsdale*, 133 Ariz. at 581 & n.1, 653 P.2d at 38 & n.1 ("it is clear from a closer reading of *Lovasco* and . . . *Marion* . . . that the ultimate question is whether there has been a violation of fundamental due process").

Likewise, in *Lovasco*, the Court compared investigative delay, which it held does not violate due process, to delay for tactical advantage, which it opined does violate due process. 431 U.S. at 795. The Court apparently made this comparison because tactical delay had been mentioned in *Marion*. *See* 404 U.S. at 324. But it did not establish tactical delay as a *sine qua non* of a due process violation; in fact, the Court alluded to a number of other possible reasons for delay that could have constitutional significance. *See Lovasco*, 431 U.S. at 797 & n.19, *citing* Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 Stan. L. Rev. 525, 527-28 (1975) (listing examples of reasons for delayed prosecution). Accordingly, we conclude the requirement of intentional delay for tactical reasons is established only by our state cases rather than by *Lovasco* or *Marion*. *See Lacy*, 187 Ariz. at 346, 929 P.2d at 1294; *Williams*, 183 Ariz. at 379, 904 P.2d at 448.

159 Ariz. 532, 543 n.2, 768 P.2d 1177, 1188 n.2 (1989) (Arizona courts not bound by Ninth Circuit's interpretation of what Federal Constitution requires). We therefore must review the trial court's ruling under the standard expressed in *Lacy* and *Williams.*

¶9 The trial court acknowledged, and Droegemeier implicitly concedes, there has been no allegation, let alone showing, of tactical delay in this case. Accordingly, because this element of the pre-indictment delay test is not met, we need not consider whether the court correctly found actual prejudice. Although the delay in this case is inordinate, the Due Process Clause has not been impinged and provides no bar to prosecution. Thus, to the extent the court ordered dismissal due to pre-indictment delay, its ruling was an abuse of discretion. *See Medina*, 190 Ariz. at 420, 949 P.2d at 509.[4] Nevertheless, because we will affirm a court's decision if it is correct for any reason, *see State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002), we next analyze the court's alternative basis for dismissal due to the state's failure to preserve evidence.

[4]Citing, *inter alia*, *United States v. Corona-Verbera*, 509 F.3d 1105 (9th Cir. 2007) and *United States v. Sherlock*, 962 F.2d 1349 (9th Cir. 1989), the trial court appears to have applied the pre-indictment delay test used by the Ninth Circuit. This test requires a defendant to make a showing of actual prejudice, after which the court must weigh the length of the delay and the state's reasons for the delay against the severity of the prejudice to determine whether a due process violation has occurred. *See United States v. Moran*, 759 F.2d 777, 780-83 (9th Cir. 1985). Although such a standard may have merit, we are bound to apply Arizona law, which requires a showing of intentional tactical delay by the state. *See Lacy*, 187 Ariz. at 346, 929 P.2d at 1294; *Williams*, 183 Ariz. at 379, 904 P.2d at 448. We further note, as the state points out, that Arizona is not alone in requiring such a showing. *See, e.g.*, *United States v. Crouch*, 84 F.3d 1497, 1514 (5th Cir. 1996) (requiring showing of intentional delay to gain tactical advantage); *United States v. Comosona*, 848 F.2d 1110, 1113 (10th Cir. 1988) (same); *State v. Krizan-Wilson*, 321 S.W.3d 619, 625-26 (Tex. Crim. App. 2010) (requiring showing of tactical delay "or other bad faith purpose").

Failure to Preserve Evidence

¶10 The state also argues the trial court erroneously dismissed the indictment on the basis of the state's failure to preserve certain evidence. Due process requires the state to preserve evidence of "constitutional materiality." *State v. Dunlap*, 187 Ariz. 441, 452, 930 P.2d 518, 529 (App. 1996); *see also State v. Walters*, 155 Ariz. 548, 551, 748 P.2d 777, 780 (App. 1987) (state has duty to preserve potentially exculpatory evidence "that is obvious, material and reasonably within its grasp"). Where the state fails to preserve such evidence, due process requires dismissal of the case if the defendant can show either that the state acted in bad faith in destroying or losing the evidence, or that the defendant suffered prejudice-in-fact because the lost evidence was exculpatory. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (*Youngblood I*); *State v. Youngblood*, 173 Ariz. 502, 507, 844 P.2d 1152, 1157 (1993) (*Youngblood II*).[5] Because Droegemeier has not established or even alleged the state acted in bad faith, due process does not require dismissal of the indictment on that basis. *See Youngblood I*, 488 U.S. at 58; *see also*

[5]Chief Justice Feldman's dissent in *Youngblood II* read the majority opinion as eliminating the prejudice-in-fact basis for establishing a due process violation resulting from loss of evidence. 173 Ariz. at 513, 844 P.2d at 1163 (Feldman, C.J., concurring in part and dissenting in part). But *Youngblood II*'s requirement of bad faith applies when a defendant can establish only speculative prejudice rather than actual prejudice. "Where there is no bad faith . . . . [t]he inference that the evidence may be exculpatory is not strong enough to dismiss the case," and "the core of the doctrine as it relates to Arizona due process is that an instruction [pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964),] is adequate where the state destroys, loses or fails to preserve evidence unless the state acts in bad faith or the defendant suffers prejudice-in-fact." *Youngblood II*, 173 Ariz. at 507, 844 P.2d at 1157. Thus, where evidence is clearly exculpatory, rather than possibly exculpatory, the loss constitutes prejudice-in-fact and due process requires dismissal, even absent bad faith.

State v. Speer, 221 Ariz. 449, ¶ 36, 212 P.3d 787, 795 (2009) ("['U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.'"), *quoting Youngblood I*, 488 U.S. at 58 (alteration in *Speer*). We therefore address only whether the trial court correctly found prejudice-in-fact stemming from the lost testimony of an alibi witness known only as "Joe" and the "psychiatric framework"[6] available at the 1979 preliminary hearing.[7]

¶11 Notably, our cases discussing the duty to preserve evidence typically involve physical evidence in the state's exclusive possession, unlike the testimonial evidence at issue here. *See, e.g., Youngblood II*, 173 Ariz. at 503-04, 844 P.2d at 1153-54 (failure to preserve semen samples and rape kit); *State v. Hansen*, 156 Ariz. 291, 294, 751 P.2d 951, 954 (1988) (crime-scene photographs and fingernail clippings and scrapings), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001); *State v. Hannah*, 120 Ariz. 1, 2, 583 P.2d 888, 889 (1978) (fingerprints obtained at crime scene); *State ex rel. Hyder v. Hughes*, 119 Ariz. 261, 262, 580 P.2d

[6]When initially interviewed shortly after the murder, Droegemeier had stated he left the victim's home the morning of the assault and went to a nearby auto parts shop. The shop manager, "Joe" confirmed to police that Droegemeier had been there sometime that morning. The psychological framework is presumably the testimony of Drs. Santiago, Gurland, and, possibly, Estes.

[7]The trial court additionally found presumptive, rather than actual, prejudice arising from the cumulative loss of evidence in this case. Although the amount of missing evidence is substantial, presumed prejudice does not trigger due process relief; the defendant must make a showing of prejudice-in-fact. *Youngblood II*, 173 Ariz. at 508, 844 P.2d at 1158. Because we agree with the trial court that the loss of other evidence in this case did not amount to prejudice-in-fact, we do not discuss that evidence here.

722, 723 (1978) (sandals, knife, clothing, food items, and photographs of footprints); *State v. Willits*, 96 Ariz. 184, 186-87, 393 P.2d 274, 276 (1964) (dynamite); *State v. Escalante*, 153 Ariz. 55, 58, 734 P.2d 597, 600 (App. 1986) (semen); *cf. State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988) (loss of evidence justifying *Willits* instruction ordinarily concerns physical evidence used in perpetration of alleged crime and in state's custody or control). Moreover, the state's duty to preserve evidence is only applicable where "'the defendant would be unable to obtain comparable evidence by other reasonably available means.'" *State v. Walters*, 155 Ariz. 548, 551, 748 P.2d 777, 780 (App. 1987), *quoting California v. Trombetta*, 467 U.S. 479, 489 (1984).[8] Because the putative alibi witness's identity and potential testimony, as well as the potential testimony of the psychologists who evaluated Droegemeier in 1978, were not under the state's exclusive custody or control, and because Droegemeier does not allege there were no other reasonably available means for him to obtain and preserve this evidence, we do not agree with the implicit finding of the trial court that the state necessarily had a duty to preserve this evidence. *See Walters*, 155 Ariz. at 551, 748 P.2d at 780. Moreover, Droegemeier has made no showing that the unavailability of these witnesses was caused by the state, whether innocently or in bad faith, other than as the

[8]We agree with the state that the missing blood samples and fingerprint evidence could not be exculpatory in this case. The blood sample taken from near a broken window in a bedroom of the house proved to be nonhuman blood, which is consistent with evidence one of the family dogs escaped from the room by breaking the window. Droegemeier also has failed to show how the fingerprint evidence would be exculpatory in light of his admission that he was at the house near the time of the assault and evidence that many other people frequented the house to purchase drugs from J.G. In any event, the trial court did not find prejudice-in-fact arising from the loss of this evidence.

result of the passage of time.[9] *See Walters*, 155 Ariz. at 551, 748 P.2d at 780; *cf. State v. Moore*, 112 Ariz. 271, 277, 540 P.2d 1252, 1258 (1975) (state did not improperly conceal defense witness where existence of witness was known to defendant, testimony could be obtained with minimum diligence, and state did nothing to prevent defendant from locating and calling witness).[10] We therefore find no due process violation based either on the present unavailability of these witnesses, *see Walters*, 155 Ariz. at 551, 748 P.2d at 780, or the fact their memories may have faded over time, *Broughton*, 156 Ariz. at 398, 752 P.2d at 487.

Conclusion

¶12 Although the length of prosecutorial delay and the cumulative loss of evidence in this case are exceptional, we must apply the due process framework set forth by our supreme court. Absent a violation under that framework, it is the state's prerogative to prosecute a properly issued indictment. *Cf. State v. Larson*, 159 Ariz. 14, 16, 764 P.2d 749, 751 (App. 1988) (state has discretion to proceed unless its authority specifically restricted by law); *Lovasco*, 431 U.S. at 790 (Due Process Clause does not

[9]We do not foreclose the possibility that witness unavailability could support dismissal of charges due to pre-indictment delay. But, as discussed above, a defendant must show both substantial actual prejudice resulting from the lost testimony and that the state's delay was to gain a tactical advantage from the unavailability. *See Lacy*, 187 Ariz. at 346, 929 P.2d at 1294; *Medina*, 190 Ariz. at 421, 949 P.2d at 510.

[10]We note that although the limited record before us may not support giving a *Willits* instruction at trial, our decision does not foreclose that possibility if Droegemeier can make the showings required by *Willits* and its progeny on remand. *See Youngblood II*, 173 Ariz. at 506-07, 844 P.2d at 1156-57 ("With respect to evidence which *might* be exculpatory, and where there is no bad faith conduct, the *Willits* rule more than adequately complies with the fundamental fairness component of Arizona due process.").

permit courts to abort criminal prosecutions based on disagreement with state's decision to bring delayed charges). Because Droegemeier did not make the required showings, the trial court's dismissal on due process grounds was erroneous. Accordingly, the trial court's order of dismissal is reversed and this matter is remanded for reinstatement of the indictment.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge